University of North Carolina School of Law
Carolina Law Scholarship Repository

Faculty Publications | Faculty Scholarship

2010

The Golden Metwand': The Measure of Justice in Shakespeare's Measure for Measure

John V. Orth
University of North Carolina School of Law, jvorth@email.unc.edu

Follow this and additional works at: http://scholarship.law.unc.edu/faculty_publications

Part of the Law Commons

Publication: *Adelaide Law Review*

This Article is brought to you for free and open access by the Faculty Scholarship at Carolina Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

*John V Orth**

'THE GOLDEN METWAND': THE MEASURE OF JUSTICE IN SHAKESPEARE'S *MEASURE FOR MEASURE*

Measure for Measure, one of Shakespeare's 'problem plays', is a dark comedy depicting Duke Vincentio's efforts to restore respect for the law after a period of lax enforcement. Peopled with a wide variety of law-enforcers and law-breakers, the play implicates numerous legal issues and has consequently attracted the attention of lawyers and judges. In the 18th century Sir William Blackstone contributed notes on the play, and in the 20th century judges have quoted from it in their judicial opinions. Like all good legal dramas, *Measure for Measure* ends with a trial scene, but one in which the Duke orders the accused to judge his own case, thereby forcing him to confront his own guilt, while Shakespeare forces us all to confront the difficulty of doing earthly justice.

Shakespeare's *Measure for Measure* was first performed by His Majesty's Players before King James I and his court on 26 December 1604.[1] The King must have been pleased with the play, which involved a princely figure not unlike himself rooting out corruption and dispensing justice 'like power divine'; he ordered a repeat performance a week later. Long recognised as a 'law play' — John Mortimer recently included it on his short list of the best fictional portrayals of the legal world[2] — *Measure for Measure* ends appropriately with a trial scene, but (as we would expect from Shakespeare) one with an unusual twist. During the final Act, charges of corruption are brought against Angelo, the deputy who ruled Vienna during the temporary absence of its Duke, Vincentio. The newly returned Duke orders an immediate trial: 'Come, cousin Angelo, / In this I'll be impartial; be you judge / Of your own cause.'[3]

---

* William Rand Kenan, Jr. Professor of Law, University of North Carolina School of Law AB (1969), (Oberlin); JD (1974), MA (1975), PhD (1977), (Harvard).

1 R C Bald 'Introduction' in *Pelican Shakespeare: Measure for Measure* (1956) 15 (reporting the performance 'by his Majesties plaiers' (otherwise known as 'The King's Men') of 'a play Caled Mesur for Mesur' by 'Shaxberd'). Line references to Acts and scenes are as numbered in this edition.

2 John Mortimer, 'Five Best: John Mortimer Presents His Case for These Fictional Portraits of the Legal World', *Wall Street Journal* (New York) 24–5 February 2007, 10. The other entries were three classic 19th-century novels — *Bleak House* and *Great Expectations* by Charles Dickens and *Orley Farm* by Anthony Trollope — and one modern crime novel, *A Certain Justice* by P D James. *Measure for Measure* was the only play.

3 5.1.165–7.

Royal reaction to this remarkable order has been lost to time, but Shakespeare's first editors were clearly shocked. Theobald commented, 'Surely, this Duke had odd notions of Impartiality; to profess it, and then commit the Decision of a Cause to the Person accus'd of being the Criminal,' and concluded in the innocency of those early days of Shakespeare scholarship, 'the Poet must have wrote as I have corrected [him], *In this I will be* partial …'.[4] Malone sensibly restored the text as attested by the First Folio, but palliated the usage by asserting that 'impartial' could sometimes be used to mean 'partial'![5] That Shakespeare wrote just what he intended is evidenced by the fact that he included a denunciation of the Duke's skewed order, delivered by none other than the Duke himself disguised as a friar: 'The Duke's unjust, / Thus to retort your manifest appeal / And put your trial in the villain's mouth / Which here you come to accuse.'[6]

As the theatre audience knows, the Duke had not, in fact, been absent but had remained in Vienna in disguise in order to observe the effects of Angelo's governance. His stated purpose was to allow Angelo, whose reputation for righteousness seemed unimpeachable, to restore respect for the law, which had declined under the Duke's too indulgent rule. 'We have strict statutes and most biting laws, / The needful bits and curbs to headstrong steeds, / Which for this fourteen years we have let slip.'[7] But the Duke also purposed a test of 'the

---

4 Lewis Theobald, *The Works of Shakespeare* (1733 ed) vol 1, 387–8; see also *A New Variorum Edition of Shakespeare: Measure for Measure* 247 (Mark Eccles, 1980 ed) (collecting authorities).

5 Edmond Malone, *The Plays and Poems of William Shakespeare* (1821 ed) vol 9, 187 (citing, inter alia, the anonymous play, *Swetnam the Woman-Hater* (1620): 'You are impartial, and we do appeal / From you to judges more indifferent').

6 5.1.298–301. Compare Portia's observation in *The Merchant of Venice* — in the casket scene, not the courtroom scene — that 'to offend and judge are distinct offices, / And of opposed natures' (*Pelican Shakespeare: The Merchant of Venice* (1959) 2.9.60–1). What could be expected from a judge in his own cause is made plain in *Twelfth Night,* when Olivia comforts the wronged Malvolio: 'Prithee be content. / This practice hath most shrewdly passed upon thee; / But when we know the grounds and authors of it, / Thou shalt be both the plaintiff and the judge / Of thine own cause' (*Pelican Shakespeare: Twelfth Night* (1958) 5.1.341–4). There is something similar in *Othello*. The Venetian Duke comforts Brabantio, who had accused the Moor of seducing his daughter Desdemona: 'Whoe're he be that in this foul proceeding / Hath thus beguiled your daughter of herself, / And you of her, the bloody book of law / You shall yourself read in the bitter letter / After your own sense' (*Pelican Shakespeare: Othello* (1958) 1.3.67–9).

7 1.3.19–21. In this one instance I have departed from the Pelican edition reading. The First Folio prints 'needful bits and curbs to headstrong *weeds*'. Pelican amends 'weeds' to 'wills', which makes more sense, but Theobald suggests 'steeds', which seems to me to make even more sense and to fit better in the consonant-heavy line (Theobald, above n 4, 306). Professor Jaffa has observed that the Duke's plan is reminiscent of Cesare Borgia's Machiavellian scheme to pacify Romagna without risking his own popularity (Henry V Jaffa, 'Chastity as a Political Principle: An Interpretation of Shakespeare's *Measure for Measure*' in J Alvis and T West (ed) *Shakespeare as Political Thinker* (1981) 181, 188–9 (citing Niccolo Machiavelli, *The Prince* (first published 1532) ch 7)).

prenzie Angelo' — 'Hence shall we see, / If power change purpose, what our seemers be'[8] — a test the deputy all too quickly failed. Soon after sentencing Claudio to death under a long-ignored law against fornication, Angelo succumbed to temptation himself when petitioned by Claudio's beautiful sister, Isabella, an aspiring nun, and offered to pardon her brother in return for sex, demanding fornication by the sister in return for pardoning it in the brother. By convenient happenstance, the Duke knew of the hitherto overlooked fact that Angelo had earlier jilted Mariana (her of 'the moated grange') after her dowry had been lost and arranged to substitute one maiden for another in the dark to satisfy Angelo's concupiscence.[9]

Compounding his offence, Angelo had actually ordered the beheading of Claudio to go ahead even as his own assault on Isabella's maidenhead was (seemingly) in prospect. Working in the background, the Duke managed to spare Claudio, deceiving both Angelo and Isabella, so that on his re-emergence in his true character in the final Act, he could stage-manage the trial of Angelo on the charges brought by the aggrieved young woman. Knowing the truth of the matter, the Duke is not in fact 'impartial' as he claims, but by observing whether Angelo will accept the assignment to be 'judge of your own cause', he is posing a public test for the unjust deputy, one Angelo also fails.

His corruption dramatically exposed, Angelo acknowledges that he is worthy to die the death he intended for another: 'Then, good prince, / No longer session hold upon my shame, / But let my trial be mine own confession. / Immediate sentence, then, and sequent death / Is all the grace I beg.'[10] The Duke readily agrees: 'An Angelo for Claudio, death for death! / Haste still pays haste, and leisure answers leisure, / Like doth quit like, and Measure still for Measure.'[11] But on the plea of Mariana, Angelo's abandoned bride with whom he had unwittingly consummated his marriage — joined dramatically by the wronged Isabella — the Duke relents, and the play manages a happy ending, complete with all the obligatory marriages, qualifying it technically for inclusion among Shakespeare's comedies.

Measure for Measure is set apart from other plays by Shakespeare, and from plays by his contemporaries, by the degree of attention it pays to law and legalism. Tudor-Stuart drama is rich in images of justice, some of it quite specifically forensic. Tim Stretton has estimated that a third or more of Elizabethan and Jacobean plays

---

8 1.3.53–4.

9 Many readers of *Measure for Measure* have wondered how the Duke knew of Mariana's mistreatment and why in light of that knowledge he trusted Angelo to be the deputy in his apparent absence. Sir William Blackstone speculated that 'the duke probably had learnt of the story of Mariana in some of his former retirements, "having ever loved the life removed". And he had a suspicion that Angelo was but a seemer and therefore stays to watch him' (Edmond Malone, *Supplement to the Edition of Shakespeare's Plays Published in 1778 by Samuel Johnson and George Steevens* (1780) vol 1, 103).

10 5.1.366–70.

11 5.1.405–7.

included a trial, an arraignment, or a lawsuit.[12] This is not surprising. Shakespeare and his fellow dramatists had a unique relationship with law and lawyers. Many, if not most, of the Tudor-Stuart playwrights themselves had legal training — or less respectable brushes with the law.[13] Ben Jonson had actually been convicted of murdering a fellow actor.[14] But as Schlegel long ago observed: 'In *Measure for Measure* Shakspeare [sic] was compelled by the nature of the subject to make his poetry more familiar with criminal justice than is usual with him.'[15]

Not only were plays like *Measure for Measure* performed before the King and his court, but the audience for contemporary drama almost always included lawyers and judges, 'His Majesty's Players' in the real life dramas daily enacted in the King's other courts, the courts of law. Many plays were actually performed in a specifically legal venue, neither the royal court nor the licensed playhouses like the Globe, but the Inns of Court. Shakespeare's *Comedy of Errors* was performed at Gray's Inn in 1594 before what was described as 'a riotous audience of learned lawyers',[16] and *Twelfth Night,* which has little to do with the holiday of its title, the last of the 'twelve days of Christmas', was performed as part of the season's festivities at Middle Temple in 1602.[17]

Perhaps present at the first performance of *Measure for Measure* was Sir Edward Coke, then the King's Attorney-General, although later his welcome at James' court would be uncertain.[18] That Coke was familiar with Shakespeare's plays cannot be doubted. In one of his speeches to a grand jury he unmistakably echoed John of Gaunt's familiar speech in praise of England from *Richard II* — 'This royal throne of kings, this sceptre'd isle, / This earth of majesty, this seat of Mars, / This other Eden, demi-paradise …'[19] — in Coke's paraphrase, 'this sea-environed island … this so-well planted, pleasant, fruitful world, accounted Eden's paradise'.[20]

---

12 Tim Stretton, *Women Waging Law in Elizabethan England* (1998) 63.

13 Ibid 64.

14 *Ben Jonson* (C H Herford and Percy Simpson eds, 1925) vol 1, 18–9.

15 A W Schlegel, *Lectures on Dramatic Art and Literature* (John Black trans, 1889 ed, 2nd revised ed by A J W Morrison) 338 (lectures originally delivered in Vienna, 1809–11).

16 Paul A Jorgensen, 'Introduction' in *Pelican Shakespeare: The Comedy of Errors* (1964) 16.

17 Charles T Prouty, 'Introduction' in *Pelican Shakespeare*: *Twelfth Night* (1958) 15.

18 Sir Edward Coke served as Attorney-General until 1606 when he became Chief Justice of the Court of Common Pleas. In 1613 he was transferred to the position of Chief Justice of the Court of King's Bench but was dismissed in 1616 because of his disagreement with the King. Coke subsequently became a leader of the parliamentary opposition and was briefly imprisoned in the Tower in 1623. On his release, he resumed his activity and took the lead in framing the Petition of Right in 1628. See generally Stephen D White, *Sir Edward Coke and the Grievances of the Commonwealth*, *1621–28* (1979).

19 *Pelican Shakespeare: Richard II* (1957) 1.4.40–66.

20 *The Lord Coke His Speech and Charge* (1607), quoted in Allan D Boyer, *Sir Edward Coke and the Elizabethan Age* (2003) 288.

If Coke was in the audience for *Measure for Measure*, the representation of a man taking jurisdiction in his own cause might have arrested his attention.[21] He was sensitive to the issue in the management of his own affairs, later deferring to a colleague to judge a dispute between himself and his tenants at Stoke.[22] And he was almost certainly conversant with the legal question from his reading of Littleton's *Tenures*. When *Measure for Measure* premiered, Coke was probably already hard at work on his massive commentary on that little treatise; Holdsworth thought he worked on it his entire life.[23]

Perhaps prompted by an actual case, Littleton had posed the question: suppose it was the custom of a certain manor that its lord could seize straying cattle and keep them until their owner paid him a fine in the amount he assessed. Could such a custom be accepted as part of the common law? To the sophisticated, or simply worldly-wise, the potential for abuse in the case appeared obvious. As Littleton put it (in Coke's translation): 'If he had dammages to the value of an halfpeny, he might assess and have therefore an *C*. [hundred] pound, which should be against reason.'[24] Reason is the test of custom, a custom claiming the force of law. Measured by reason, this custom fails, 'because it is against reason, that if wrong be done any man, that he thereof should be his own judge'.[25]

To be your own judge, or even to have a serious conflict of interest, seems obviously unfair, a violation of common sense as well as common law. The ever-sensible Dr Johnson thought it 'the standing and perpetual rule of distributive justice ... to believe no man in his own cause'.[26] For just this reason, the common law famously excluded the testimony of parties in their own lawsuits, a rule memorably mocked by Charles Dickens in the ludicrous breach of promise suit,

---

21 I have earlier discussed the paradigm case of making a man a judge in his own cause in *Due Process of Law: A Brief History* (2003) ch 2. Some of the same sources used in that discussion are here put to a different use.

22 'Thear grew sum smale questions between him and sum of his tenants at Stoke about copies. He sent for me, prayed me to keep his court, and to order all things as I sholde see cawse in justice, upon view of his rolles and that he wolde be contented with what I determined withe him or against him' (James Whitelocke, *Liber Famelicus* (John Bruce ed, 1858) 50). James Whitelocke served with Coke on the Court of King's Bench.

23 William Holdsworth, *History of English Law* (3rd ed, 1945) vol 5, 466.

24 Edward Coke, *Commentary upon Littleton* (1628) section 212, 141a ('*s'il avoit dammages forsque al value d'un mail, il puissoit assesser et aver pur ceo C. lib*').

25 Ibid ('*pur ceo que il est encounter reason, que si tort soit fait a un home, que il de ceo serroit son judge demesne*'). Reason remained a test of good custom for Blackstone: 'To make a particular custom good, the following are necessary requisites … [among them, it must be] 'reasonable; or rather, taken negatively … not … unreasonable' (William Blackstone, *Commentaries on the Laws of England* (first published 1765–9, 1979 ed) vol 1, 76–8). Indeed, it still is: *State ex rel Thornton v Hay* 462 P 2d 671, 677 (Or 1969) (citing Blackstone).

26 *The Quotable Johnson* (Stephen C Danckert ed, 1992) 74 (attributed).

Bardell v Pickwick.[27] In America, James Madison in the justly celebrated *Federalist No. 10* explained that 'no man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity'.[28]

The evil is no less obvious in a non-common law legal system, such as that in the Vienna of *Measure for Measure* — or in the Scotland from which King James had lately come. In the *Corpus Juris Civilis*, Julian is quoted as saying that 'if one of the litigants has made the judge heir to all or part of his estate, another judge must of necessity be appointed, because it is unfair to make someone judge in his own affairs'.[29] Canon law makes the possibility to profit from a decision one of the grounds to exclude a judge.[30] Blaise Pascal included among his recorded thoughts that 'the fairest man in the world is not allowed to be a judge in his own cause'.[31]

Four years after the first performance of *Measure for Measure*, James' court was the scene of another drama involving a sovereign and his deputy, in this case King James himself and Sir Edward Coke, by then Chief Justice of the Court of Common Pleas. According to his own account,[32] Coke told James to his face that the sovereign could not personally judge a cause between himself and his subjects but had to act through his deputies, the judges. 'The King in his own person cannot adjudge any case either criminal, as treason, felony, &c. or betwixt party and party, concerning his inheritance, chattels, goods, &c.'[33] As Coke explained, 'a party cannot have remedy against the King; so if the King give any judgment, what remedy can the party have?' In a rare burst of tact, he omitted to point out that a remedy would be required only if the King gave a mistaken judgment. In this case,

---

27 Charles Dickens, *The Posthumous Papers of the Pickwick Club* (first published 1836–37, 1948 ed) ch 34; see also William S Holdsworth, *Charles Dickens as a Legal Historian* (1928) ch 4.

28 Alexander Hamilton, James Madison and John Jay, *The Federalist* (first published 1787–88, Benjamin Wright ed, 1961) 131.

29 *Corpus Juris Civilis* (Alan Watson trans, 1985 ed) 5.1.17 ('*si alter ex litigatoribus iudicem solum heredem uel ex parte fecerit, alius iudex necessario sumendus est, quia iniquum est aliquem suae rei iudicem fieri*').

30 The modern codification is in Canon 1448. (*Code of Canon Law: Latin-English Edition* (1983) 522–3: '*Iudex cognoscendam ne suscipiat causam, in qua ratione … lucri faciendi aut damni vitandi, aliquid ipsius intersit*'). Other grounds for exclusion are consanguinity, affinity, fiduciary relationship, amity or enmity.

31 Blaise Pascal, *Pensées* (1670) frag 44 ('*Il n'est pas permis au plus equitable homme du monde d'être juge en sa cause*').

32 *Prohibitions del Roy* (1608) 12 Coke 65; 77 ER 1342. Coke may have engaged in a little playwriting himself. Holdsworth thinks it 'likely that Coke, having attended several Council meetings at which the king expressed his views as to the subordination of the law to the king, gave a narrative in which he stated the royal views, added authorities in favour of his own views, and threw it into a literary form which bears little resemblance to the spoken words used on this particular occasion … or the events which really happened' (Holdsworth, above n 23, vol 5, 430).

33 *Prohibitions del Roy* (1608) 12 Coke 64–5; 77 ER 1342.

it was the deputies who were impartial and the King who was trying to judge his own cause.

To James' retort that 'the law was founded on reason and that he and others had reason, as well as the Judges', Coke made his famous reply about the distinctive nature of legal reasoning, particularly in the common law:

> Causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain cognizance of it. ... The law... is 'the golden metwand and measure to try the causes of the subjects …, [it] protect[s] His Majesty in safety and peace.[34]

Indelicately, Coke alluded to the fact that James, born and bred in Scotland and only lately heir to the English Crown, was 'not learned in the laws of his realm of England'. When the King cried treason, Coke said he responded with high medieval authority: 'Bracton saith … *Rex non debet esse sub homine, sed sub Deo et lege*' (the King must not be under man, but under God and the law)[35] — before, that is, he fell prostrate at the feet of the angry monarch.[36]

The ideal of a 'government of laws and not of men' crossed the Atlantic with English settlers, beginning with the band that settled at Jamestown, Virginia, even as James and Coke were facing off. After American Independence, John Adams, like Coke linking the idea to the concept of separation of powers, spelled it out at perhaps unnecessary length in the Massachusetts Constitution, where it still is:

> In this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.[37]

---

34 *Prohibitions del Roy* (1608) 12 Coke 65; 77 ER 1343. Coke also described the laws of England as 'the golden metwand, whereby all men's causes are justly and evenly measured' in his *Fourth Institute* (1817) ch 47, 239.

35 *Prohibitions del Roy* (1608) 12 Coke 65; 77 ER 1343. The passage to which Coke referred may be found in Bracton, *De Legibus et Consuetudinibus Angliae* (S E Thorne trans, George E Woodbine ed, 1968) vol 2, 33). In 1928, Harvard Law School Dean Roscoe Pound chose a lapidary version of Coke's admonition to inscribe over the portal of the enlarged Langdell Hall: NON SVB HOMINE SED SVB DEO ET LEGE (Arthur E Sutherland, *The Law at Harvard: A History of Ideas and Men, 1817–1967* (1967) illustration facing page 243).

36 Catherine Drinker Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke* (1956) 305 (quoting Sir Rafe Boswell).

37 Mass. Const. of 1780, Decl. Rts. XXX, in *The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780*, at 447–8 (Oscar & Mary Handlin eds 1966).

John Marshall repeated the maxim 'emphatically' in *Marbury v Madison*, the landmark case for 'judicial review', the doctrine that American judges have the power to declare statutes unconstitutional and void.[38]

Two years after his historic face-off with King James, Coke returned to the problem of 'a judge in his own cause' in that *cause célèbre, Bonham's Case*.[39] Dr Thomas Bonham was charged by the Royal College of Physicians with practising physic in London without a licence. As permitted by its royal charter, which had been repeatedly confirmed by statute, the college tried Bonham in its own court. Finding him guilty, it imposed sentence of fine and imprisonment, and — as also permitted by its charter — prepared to pocket half the fine. When Bonham challenged his confinement in an action for false imprisonment, Coke delivered an elaborate opinion in his favour. Carefully reading the crabbed language of the ancient charter, Coke found that the college was not in fact empowered to imprison for unlicensed practice but only for malpractice, which had not been alleged.

Although technically the question of Bonham's fine was not before him, Coke addressed it anyway, acidly commenting that the physicians 'cannot be judge, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture'.[40] In characteristic fashion, he capped his judgment with Latin reminiscent of the Corpus Juris: '*aliquis non debet esse judex in propria causa...*' (someone ought not be a judge in his own cause).[41]

As in *Bonham's Case*, so in *Measure for Measure* the proper order of things is turned upside down: a subordinate is deputed to try his own cause. Angelo is now cast in the heroic role invoked in the medieval *Chancellor of Oxford's Case* (1430).[42] Like the lord of the manor described by Littleton who claimed the right to assess his own damages, the Chancellor of Oxford claimed the right to adjudicate his own expenses in repairing pavements along the High Street left unrepaired by the adjoining householders. The claim was resisted by the plea that the Chancellor could not be a judge in his own cause. To answer that plea and to demonstrate the possibility of fairness even in such a case, the unnamed serjeant arguing for the Chancellor recited the fanciful tale of an early Pope who was accused by the cardinals of a serious offence. When the Pope demanded that they judge him, they refused because he was their superior, the temporal head of the church on earth. So the Pope tried his own cause and condemned himself to death.[43] Angelo, the

38 5 US (1 Cranch) 137 (1803) 163.

39 (1610) 8 Coke 107a; 77 ER 638.

40 Ibid, 118a.

41 Ibid. Cf *Corpus Juris Civilis*, above n 29, 5.1.17. See text at n 29 above.

42 (1430) Y B Hilary 8 Hen 6, f 18b, pl 6, described in D E C Yale, '*Iudex in Propria Causa:* An Historical Excursus' (1974) 33 *Cambridge Law Journal* 80, 92–5.

43 Yale thought the recitation of the legend was not meant to be taken seriously — 'I suspect that the serjeant's "fable" was intended for light relief at the end of a morning's argument rather than anything else' — but conceded that it was 'widely believed in the Middle Ages' (above n 42, 94).

fallen angel in *Measure for Measure*, reaches the same conclusion, but only after the intervention of the Duke, 'like power divine'.

In the years that followed the first performance of *Measure for Measure*, the relation between James and Parliament steadily deteriorated until, under his son Charles I, civil war erupted, ending in the final defeat of the royal forces and the trial and condemnation of the King by deputies — not his own, of course, but Parliament's. No one forty years earlier, not even Shakespeare, could have foreseen this dramatic outcome.[44]

The ironies of history are never-ending. As a result of Parliament's famous victory over the Crown, consolidated by the Glorious Revolution of 1688, Parliament won control over the law as well. Blackstone, commenting on the laws of England on the eve of the American Revolution, was forced to admit that the common law had to yield to legislation: 'Where the common law and a statute differ, the common law gives place to the statute …'[45] To demonstrate once and for all that the old verities were gone, the Commentator took up the hoary problem of a judge-in-his-own-cause. It was 'evil', a violation of natural right, to be avoided if at all possible.[46] A grant of general jurisdiction to a judge, 'to try all causes that arise within his manor of Dale', should be construed not to extend to that extremity, 'because it is unreasonable that any man should determine his own quarrel'.[47]

But, Blackstone reluctantly conceded:

> If we could conceive it possible for the parliament to enact, that he should try as well his own causes as those of other persons, there is no court that has power to defeat the intention of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no.[48]

In short, Parliament could do what the common law could not do: defy reason itself. 'If the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it.'[49] Separation of powers, which Coke had used as a bulwark against royal aggression, had become a barrier the courts could

---

44 Shakespeare was remembered at the time. The lines from *Macbeth* — 'Nothing in his life / Became him like the leaving it' (1.4.3–4) — were reportedly applied to the martyred king (*Pelican Shakespeare: Macbeth* (1956)).

45 Blackstone, above n 25, vol 1, 89 (canon of statutory construction no 7).

46 Ibid, vol 4, 8.

47 Ibid, vol 1, 91 (canon of statutory construction no 10: 'Acts of parliament that are impossible to be performed are of no validity, and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void').

48 Ibid.

49 Ibid. For further discussion of Blackstone's canons of statutory construction, see John V Orth, 'Blackstone's Rules for the Construction of Statutes' in Wilfrid Prest (ed) *Blackstone and His Commentaries: Biography, Law, History* (2009) 79.

not pass. Even without Duke Vincentio's benign motive of dramatically exposing injustice, Parliament could order its Angelos to try their own causes, and no court in England could stop it.

But not in America! — at least not after Independence and the development of American constitutional law. When in 1928 the United States Supreme Court finally confronted the case of a-judge-in-his-own-cause, in the form of a statute that allowed a magistrate to keep part of any fines he imposed, it found the practice a violation of constitutionally protected due process.[50] Sir Edward Coke would have approved.

Whether Coke approved of the denouement in *Measure for Measure* is another matter. The Duke's pardon of all and sundry saved the play from a bloody ending, but exemplified the kind of discretionary justice that precipitated the 'war of the writs' between the courts of common law and equity. As Tim Stretton reminds us, Coke and his fellow judges were inclined to strict enforcement, even of penal bonds that almost (but not quite) reached the extremity of Shylock's pound of flesh.[51] In Coke's words: 'All causes should be measured by the golden and straight metwand of the law, and not by the incertain and crooked cord of Discretion.'[52]

As befits England's greatest property lawyer, Coke's chosen image of the law was a metwand, also spelled (and perhaps usually pronounced) metewand, a sort of yardstick used for the legal description of land by metes and bounds[53] — the way it is still done in some American states.[54] Thinking of the law as a measuring rod also came naturally to John Selden, Coke and Shakespeare's scholarly contemporary, who expressed the common law's fear of discretionary justice by his memorable comparison of equity to the length of the Chancellor's foot:

> For law we have a measure … [and] know what to trust to: equity is according to the conscience of him that is Chancellor, and as it is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure we call a foot, to be the Chancellor's foot.[55]

---

50 *Tumey v Ohio*, 273 US 510 (1928) (citing *Bonham's Case*).

51 Tim Stretton, 'Contract, Debt Litigation and Shakespeare's *The Merchant of Venice*' (2010) 31 *Adelaide Law Review* 111. In common with other common lawyers, Coke believed that written instruments, and the terms they contained, needed to be taken seriously and enforced, even in cases involving apparent injustice.

52 Edward Coke, above n 34, ch 1, 41.

53 Compare this with the entry in the table in Edward Coke, above n 34, under 'Discretion' ('metewand'). According to tradition, King Henry I 'made the length of his own arm the standard of the mete-wand': Francis Palgrave, *The History of Normandy and England* (1851–64) vol 4, 709.

54 See, eg, Patrick K Hetrick and James B McLaughlin, Jr, *Webster's Real Estate Law in North Carolina* (5th ed, 1999) vol 1, 419 ('In North Carolina the most usual method of describing land, particularly nonurban and irregularly shaped tracts, is by metes and bounds').

55 *Table Talk of John Selden* (Frederick Pollock ed, 1927) 43 (spelling and punctuation modernised).

Images of weights and measures abound in *Measure for Measure.* Isabella admits, 'We cannot weigh our brother with ourself'.[56] Angelo, who before he succumbs to temptation prides himself on his 'gravity', which he would not change 'for an idle plume / Which the air beats for vain',[57] is soon taunting Isabella: 'Say what you can, my false o'erweighs your true.'[58] The Duke pretends to disbelieve Isabella when she accuses Angelo because 'If he had so offended, / He would have weighed thy brother by himself, / And not have cut him off'.[59] Finally, dropping his disguise, the Duke proceeds 'by cold gradation and well-balanced form'[60] to have 'the corrupt deputy scaled',[61] weighed in the balance and found wanting — until, that is, he is persuaded to pardon all offenders.

It is tempting to read the conclusion of *Measure for Measure* as the triumph of mercy over justice, and the religiously inclined seem particularly to favour this reading.[62] But Shakespeare is obviously aware of the paradoxical nature of 'the quality of mercy'. Escalus, left by the Duke as second in command, early admits that 'Mercy is not itself, that oft looks so; / Pardon is still the nurse of second woe'.[63] As if to demonstrate the point, Mistress Overdone overdoes it in the next Act when she pleads for mercy, provoking the exasperated response: 'Double and treble admonition, and still forfeit in / the same kind! This would make mercy swear and play / the tyrant.'[64] As the unsympathetic Angelo correctly observes: 'Those many had not dared to do that evil, / If the first that did the edict infringe / Had answer'd for his deed'.[65] He unerringly puts his finger on the flaw in Isabella's facile argument that he should condemn the sin but pardon the sinner: 'Condemn the fault and not the actor of it? / Why, every fault's condemned ere it be done.'[66] Responding to her plea for pity, he makes the wise retort: 'I show it most of all when I show justice, / For then I pity those I do not know.'[67]

There is no greater danger in reading Shakespeare than reductionism. German writers seem particularly susceptible. Richard Wagner in his early opera *Das Liebesverbot* (usually translated as *The Ban on Love*) turned *Measure for Measure*

---

56 2.2.126. Theobald adopts William Warburton's sensible suggestion that Shakespeare intended 'We cannot weigh our brother with *yourself*' (Theobald, above n 4, vol 1, 338).

57 2.4.11–2.

58 2.4.170.

59 5.1.110–2.

60 4.3.97.

61 3.1.248.

62 See, eg, C M A McCauliff, 'The Bawd and the Bard: Mercy Tempers Strict Statutory Application in Shakespeare's *Measure for Measure*' (2004) 43 *Catholic Lawyer* 81; Michael J Willson, 'A View of Justice in Shakespeare's *The Merchant of Venice* and *Measure for Measure*' (1995) 70 *Notre Dame Law Review* 695.

63 2.1.267–8.

64 3.2.181–3.

65 2.2.115.

66 2.2.37–8.

67 2.2.100.

into a parody of German hypocrisy about sex,[68] while Bertolt Brecht, trying to repeat his success in adapting *The Beggar's Opera,* succeeded only in producing the forgettable *Die Rundköpfe und die Spitzköpfe* (*Roundheads and Peakheads*),[69] a Marxist caricature of official corruption and class bias.[70]

Curiously, among all the legal issues raised in *Measure for Measure* the one thing not mentioned is the one that comes most readily to the restless modern mind: law reform. Repeal the law against love, or at least reduce the sentence. The Duke in disguise seems to hover on the edge of awareness: 'Laws for all faults, / But faults so countenanced that the strong statutes / Stand like forfeits in a barber's shop, / As much in mock as mark.'[71] In fact, one modern legal scholar has read *Measure for Measure* as Shakespeare's dramatic manifesto against 'laws seeking to enforce private morality',[72] using it to condemn a 1986 United States Supreme Court decision upholding the constitutionality of a state statute criminalising sodomy[73] — a decision, incidentally, the Court has since overturned.[74]

But this is just another reductionist reading of the play. Shakespeare is, of course, acutely aware of the difficulty of legal enforcement in such matters. Pompey, the clownish tapster, asks Escalus: 'Does your worship mean to geld and splay all the / youth of the city?'[75] And the fantastic Lucio informs the Duke in disguise that 'it is impossible to extirp it quite, friar, / till eating and drinking be put / down'.[76] The Provost observes that 'all sects, all ages smack of this vice'.[77] Even the saintly

---

68 Wagner's own plot summary of *Das Liebesverbot* (1836) is in his autobiography, *My Life* (first published 1880, Andrew Gray trans, Mary Whittall ed, 1983) 113–8. For a critical analysis of the opera, see Charles Osborne, *The Complete Operas of Wagner* (1990) 40 (in which Wagner's libretto is described as 'a travesty of Shakespeare's play'). *Das Liebesverbot* received one of its rare public performances at the Glimmerglass Opera in Cooperstown, New York from 19 July to 22 August 2008. Reviews appeared in the *New York Times* (12 August 2008), *Wall Street Journal* (13 August 2008), and *Financial Times* (15 August 2008). See also *Opera News* (November 2008) 44–5.

69 Bertolt Brecht, *Roundheads and Peakheads: Rich and Rich Make Good Company* (N Goold-Verschoyle trans, 1937), in *Jungle of Cities and Other Plays* (1966) 167–283.

70 For a more sympathetic assessment of Brecht's adaptation and an argument that he correctly understood Shakespeare's meaning, see Louise Halper, '*Measure for Measure*: Law, Prerogative, Subversion' (2001) 13 *Cardozo Studies in Law and Literature* 221. Daniel J Kornstein has his doubts. See 'A Comment on Professor Halper's Reading of *Measure for Measure*' (2001) 13 *Cardozo Studies in Law and Literature* 265.

71 5.1.317–20. A learned New Jersey Superior Court Judge quoted the lines to illustrate 'the laxity of law enforcement in the area of barber shops': *Tomasi v Wayne*, 313 A 2d 229, 233 (NJ Super 1973) (Schwartz J).

72 Daniel J Kornstein, *Kill All the Lawyers? Shakespeare's Legal Appeal* (1994) 35–51.

73 *Bowers v Hardwick*, 478 US 186 (1986).

74 *Lawrence v Texas*, 529 US 558 (2003).

75 2.1.217–8.

76 3.2.96–7.

77 2.2.5.

Isabella is aware 'there's many have committed it',[78] and Angelo soliloquises 'We are all frail'[79] — before, that is, rushing off to his assignation.

There is certainly a problem with what Judge Bork has described as laws that are 'kept on the books as precatory statements, affirmations of moral principle',[80] often involving sexual practices. But the legal enforcement of private morality is just an extreme instance of a more general problem. So long as law forbids any form of human behaviour, the guilty party will claim extenuating circumstances and appeal to the judge for mercy. Whether Claudio should have been punished for fornication or not — and much ink has been spilled on the question of what his 'true contract' with Juliet entitled him to[81] —there seems little reason not to punish Angelo for his obstruction of justice.[82] Yet he is pardoned.

More than any other of his plays, Shakespeare's *Measure for Measure* deals openly with religious, specifically Christian, themes.[83] The playwright all but puts the holy name in Isabella's mouth when, pleading for her brother, she invokes the doctrine of the atonement: 'Alas, alas; / Why, all the souls that were were forfeit once, / And He that might the vantage best have took, / Found out the remedy.'[84] The Duke's sentence on Angelo inevitably puts the Bible-conscious listener in mind of the Sermon on the Mount: 'Judge not, that ye be not judged. / For with what judgement ye judge, ye shall be judged, and with what measure ye mete, it shall be measured to you againe.'[85]

---

78 2.2.89.

79 2.4.121.

80 Robert H Bork, *The Tempting of America: The Political Seduction of the Law* (1990) 96. See also Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962) 147. Both were referring to the birth control case, *Griswold v Connecticut*, 381 US 479 (1965).

81 See, eg, S Nagarajan, '*Measure for Measure* and Elizabethan Betrothals' (1963) 14 *Shakespeare Quarterly* 115; Karl P Wentersdorf, 'The Marriage Contracts in *Measure for Measure*' (1979) 32 *Shakespeare Survey* 129; Margaret Scott, ''Our City's Institutions': Some Further Reflections on The Marriage Contracts in *Measure for Measure*' (1982) 49 *English Literary History* 790. See also McCauliff, above n 62.

82 Mariana's plea for Angelo — 'His act did not o'ertake his bad intent, / And must be buried but as an intent / That perished by the way. Thoughts are no subjects, / Intents but merely thoughts' (5.1.447–9) — has been quoted to illustrate the proposition that 'in the criminal law, both a culpable mens rea and a criminal actus reus are generally required for an offense to occur' (*US v Apfelbaum*, 445 US 115, 132 (1980) (Rehnquist CJ) citing Glanville Williams, *Criminal Law* (2nd ed, 1961), 6). But although Angelo failed in his attempt to extort Isabella's consent to sex, in his attempt to order the untimely execution of Claudio, and in his attempt to acquit himself of corruption — all due to the Duke's behind-the-scenes intervention — he did more than simply think about the attempts; he acted on them.

83 See generally Darryl Gless, *Measure for Measure, the Law, and the Convent* (1979).

84 2.2.72–5.

85 Matthew 7:1–2 (Geneva Bible).

What is the Christian magistrate to do — charged with judging others, yet fearful for his own salvation? The priggish Angelo has an answer. His first and second response to Isabella's plea for her brother's life is to deny personal responsibility: 'It is the law, not I, condemns your brother'.[86] 'I, now the voice of the recorded law, / Pronounce a sentence on your brother's life.'[87] Richard Posner dismisses the argument on rather flimsy Freudian grounds. Angelo's legalism, he says, is 'connected with his being a natural underling, as well as with his effort to transcend his body and become all spirit'; it is 'associated with immature, weak, and father-fixated personalities'.[88]

And yet I am not sure I know a better answer to the dilemma of judging than to dissociate the person of the judge from the judicial office. 'The law, not I ….' It may certainly, as in *Measure for Measure*, lead to arrogance in the person and harshness in the result, which is the point of Isabella's bitter outburst about 'man, proud man, / Dressed in a little brief authority, / Most ignorant of what he's most assured'.[89] But it may also endow an individual with the courage to discharge his duty. Sir Edward Coke probably did not need an access of courage, but his rallying cry to the House of Commons may have emboldened others: 'The common law hath admeasured the King's prerogative. It is not I, Edward Coke, that speaks it but the records that speak it.'[90] 'I, now the voice of the recorded law …'

Sexual desire had threatened to overbalance the established order in Vienna, but in the end all the sexual miscreants — Claudio, Angelo, Lucio, perhaps even the Duke himself — are safely housed in matrimony, sentenced to marriage rather than to death, to paraphrase W H Auden.[91] But the play's ending is actually no conclusion.

---

86 2.2.80.

87 2.4.61–2.

88 Richard A Posner, *Law and Literature: A Misunderstood Relation* (1988) 109. See also *US v Chischilly*, 30 F 3d 1144, 1163–4 (9th Cir, 1994) (Noonan J, dissenting): 'Angelo's words to Isabella in *Measure for Measure* are classic in denying responsibility for what has to be the act of the judge, however much that act is in conformity with law'.

89 2.2.117–9. The lines have served as a counsel of humility to lawyers and judges. Francis Biddle, US Attorney General from 1941 to 1945, entitled the second volume of his autobiography, *In Brief Authority* (1962). Justice Eugene F Black of the Michigan Supreme Court quoted the line five times in his judicial opinions: *Michigan State UAW Community Action Program Council (CAP) v Austin*, 198 NW 2d 385, 404 (Mich 1972) (Black J, dissenting); *Magreta v Ambassador Steel Co*, 158 NW 2d 473, 476 (Mich 1968) (Black J, concurring); *In re Apportionment of Michigan Legislature*, 140 NW 2d 436, 439 (Mich 1966) (Black, J); *Taylor v Auditor General*, 103 NW 2d 769, 786 (Mich 1960) (Black J, dissenting); *Fritts v Krugh*, 92 NW 2d 604, 619 (Mich 1958) (Black J, dissenting). Susie Sharp, later the Chief Justice of North Carolina, reported that a fellow judge passed along the quotation on her first judicial appointment (Anna R Hayes, *Without Precedent: The Life of Susie Marshall Sharp* (2008) 146.

90 Quoted in Bowen, above n 36, 291

91 W H Auden, *Lectures on Shakespeare* (Arthur Kirsch ed, 2002) 191 ('In the play, in every case, marriage is substituted for the death penalty').

As Schlegel observed long ago, since the Duke 'ultimately extends a free pardon to all the guilty, we do not see how his original purpose, in committing the execution of the laws to other hands, of restoring their strictness, has in any wise been accomplished'.[92] At the end, we are back at the beginning.

There are many wise counsels for law and lawyers in *Measure for Measure*, perhaps too many, for they tend to cancel one another out. At the risk of being reductionist myself, I suggest that the judge-in-his-own-cause is the play's central image, reminding us that we are all in that predicament; that when we judge others, we judge ourselves; that in some sense we in the legal profession should not be doing what we must do. As Isabella challenged Angelo: 'Go to your bosom; / Knock there, and ask your heart what it doth know / That's like my brother's fault: if it confess / A natural guiltiness such as is his, / Let it not sound a thought upon your tongue / Against my brother's life.'[93] Judge not. May God have mercy on us all!

92 Schlegel, above n 15, 388.

93 2.2.136–41.